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Environmental Consulting

May 23, 2016

Via email – MitchelD@CharlesCountyMD.gov

Board of Charles County Commissioners
c/o Danielle Mitchell, Clerk
200 Baltimore Street
P. O. Box 2450
La Plata, MD 20646

Re: Proposed Comprehensive Plan – Water Quality and Resources

Dear members of the Board of County Commissioners:

As a regionally recognized water resources practitioner and leader in Maryland for 30 years, I completed 17 years of service with the Maryland Department of the Environment (MDE) leaving as a manager in the Wetlands and Waterways Program, followed by private water resource consulting since 2001 where I was the manager of the environmental departments of two civil engineering firms, and now currently principal of Andrew T. Der & Associates, LLC.

My experience and expertise includes water quality stream and wetland regulation, restoration, Clean Water Act (CWA) Section 402 National Pollutant Discharge System (NPDES) Municipal Separate Storm Sewer System (MS4) and CWA Section 303b Total Maximum Daily Load (TMDL) compliance, and the ecological aspects of stormwater management (SWM). While at MDE, I assisted in the preparation of the MDE SWM Manual, managed the review of complex wetland and waterway permit (WWP) applications, and applied Anti-degradation Policy (ADP) criteria through CWA Section 401 Water Quality Certification (WQC) review of CWA Section 404 U. S. Army Corps of Engineers (Corps) permits prior to the creation of the current MDE WWP process in place.

I subsequently authored numerous regulatory documents and published works and have provided expert testimony regarding water quality regulation and SWM in regards to various deliberations including the Maryland Senate and House Environmental Committees, Charles County Board of Commissioners and Planning Commission, Montgomery County Council, Maryland National Capital Planning Commissioners, and Montgomery County Board of Appeals. I have worked on numerous capital improvement and development projects in Charles County and been an on-call contactor for Planning and Growth Management.

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I respectfully provide the following general comments regarding the draft Comprehensive Plan (Plan) for consideration regarding future deliberative regulatory and planning decisions associated with surface water quality management and compliance.

The County is to be commended for producing such a comprehensive plan needing to address a multitude of complex and inter-related issues having long-range implications to the County and its citizens. Managing the County's water resources, and methods to improve and restore them, have evolved extensively over a learning curve yielding valuable data since such issues are dynamic and not static. As a result, we now know more effective and practical means to regulate activities that minimize and mitigate impacts from human activity. The County is experiencing numerous challenges of balancing desirable growth as more people enjoy living there, with mindful conservation and preservation of its valuable water resources.

I encourage the County through its Plan to effectively apply its resources to the most pressing challenges as a priority utilizing appropriate technical presumptions in their planning process. Specifically, as it applies to stormwater and nonpoint source management.

The Chesapeake Bay Program's data shows that the primary sources of nutrient (sediments, nitrogen, phosphorous) are legacy land use prior to pre-stormwater management criteria and agriculture. The plan should continue to target, and prioritize, these sectors through increase CWA Section 402 NPDES MS4 and TMDL Watershed Implementation Plan (WIP) efforts in lieu of allocating a disproportionate degree of new and additional resources and concern to new development activities. While they may garner their fair share of anecdotal attention, in reality a multitude of existing regulatory criteria administered somewhat independently already sufficiently and thoroughly address this concern – which does not appear to be adequately acknowledged in the Plan.

Given the layers of stream buffering, contemporary SWM criteria, and resource mitigation required today, experience has shown that now the mere presence of human activity does not in and of itself necessarily result in inevitable stream impact. For example, the historic "traditional" and technically based charts and graphs that linearly correlate impervious surfaces with a degree of stream impact from stormwater runoff should not alone be used as a basis for deliberative decisions without considering other factors. This is because the studies they are based on relate to watersheds with little or no SWM and stream protection of the nature required today.

Water regulation in concept is driven at a fundamental level by the need to protect the receiving stream, therefore what matters is what the stream "sees". And from that perspective, any proposed impervious surface needs to be described in terms of effective impervious cover (EIC) - or the runoff that actually will reach a stream after multiple disconnections and setback buffering from various local and state regulatory criteria in addition to any environmental site design (ESD) to the maximum extent practicable (MEP) per Maryland's SWM law.

Further, means of compliance can also vary significantly depending on numerous site-specific characteristics such as subsurface soils, topography, vegetative cover, type of project, and location of any impervious cover. If impervious surface assumptions alone are to be considered as conclusive enough to establish policy and regulatory decisions, one then could logically and conversely argue if impervious cover is under any established threshold, then no SWM of any is necessary, but management is still required.

Any new development or subdivision is required to observe a minimum Resource Protection Zone (RPZ) of 50 to 100 feet or more of stream setback. In the tidal Chesapeake Bay Critical Area (CBCA), not only is a 100-foot buffer required but also restricted density, impervious surfaces, and even a 10% pollutant reduction rule depending on the mapped overlay. Concurrently, under these criteria, priority stream and water-side forest must also be retained or planted. A multitude of research has shown the majority of stormwater pollutants are filtered and managed within the first 75 to 100 feet of vegetative buffering alone, hence the requirement.

Add to that any: MDE/Corps wetland permitting requiring avoidance and minimization and mitigation; MDE Tier II waters avoidance with 100-foot buffering and avoidance; and public/private partnering of MS4 stormwater retrofit and stream restoration and WIP initiatives – before any consideration of ESD to the MEP and best management practices (BMP) as well as MDE erosion and sediment control (ES) and NPDES construction general permit (GP) criteria.

Although required for compliance and encouraged in the first of three SWM plan submissions under current Maryland regulations, stream buffer disconnect is still not fully credited against a SWM burden in the planning stages as an effective best management (BMP) and component of a SWM or E/S plan. The combination of stream buffer setbacks along with buffer forest retention and planting effectively filters and disconnects new impervious surfaces before even considering any ESD to the MEP or ES practices of the nature required today.

The application and benefits of MDE's SWM development and re-development criteria appear to be understated in the Plan. It's requirement is not just to apply ESD to the MEP but also to provide ecologically-oriented best management practices emphasizing first flush vegetative and filtration practices to mimic "woods in good condition" – and this is in addition to buffer filtering and disconnection. Since, from the perspective of the stream, vegetated buffers already treat stormwater pollutants, a contemporary SWM plan can even achieve a level of redundancy since these further renders surfaces potentially ineffective.

Frequently, existing pre-SWM land use, both industrial and agricultural, already contributes to existing degrading water quality. Therefore, the ultimate outcome is the act of development – or redevelopment under MDE re-development regulations - subject to the additional cumulative stacked benefits above, can even yield a net gain, and is also a significant short coming in projecting Bay TMDL compliance and Accounting for Growth assumptions. In other words to what extent will there be anything to offset afterward?

Of additional concern is an over-emphasis of the regulatory criteria of the U. S. Environmental Protection Agency (EPA) ADP for Tier II designated state waters via policy actions, as administered through other existing permitting procedures without any rule-making. While the Plan builds on MDE's Tier II initiatives along with their letter of June 13, 2012, the manner in which the process is applied appears incongruent with other criteria already in place as if none of the multitude of the aforementioned regulatory programs actually existed. The regulated public has previously shared these concerns to the MDE regarding this matter and summarize it as follows.

The ADP reflects CWA provisions requiring States to implement the protection of the existing use and quality of its waters as determined by whatever means is appropriate at a given time with acceptable methodology. It is more narrative than numerical and therefore can be subjective and mandates that the state's existing water quality or designated use cannot be downgraded. Many waters are not of that level of higher quality and do not often trigger this process.

However, for higher quality waters (including those designated as Tier II), the ADP process is implemented for new construction by various avenues when triggered via corresponding review processes. This frequently invokes contemporary nonpoint source best management practices including maximal stream buffering, minimizing impervious surfaces, modern water quality attenuating devices, and a potential lengthy stream monitoring study.

The ADP itself is not a "permitting" process but rather is administered by comment coordination through various other permit-generating review processes requiring state water resource authorizations for construction activities – the most common one being the WWP process. The MDE first adopted EPA ADP review policy and criteria in 1985 as part of its state water quality standards and was the only means then to require nonpoint source water quality management – or true stormwater quality management – at a time when none existed.

I recall when doing these reviews at MDE back then, this was the first time some new projects needing a WQC were required to implement nonpoint source management practices before current stormwater and buffer criteria existed. At that time, resource protection centered more on public health compliance as specified in Code of Maryland Regulations (COMAR) (mostly shellfish waters and trout streams as bio-indicators of water quality), and was meant to complement the original ADP intent of NPDES point source discharge compliance of factories and Waste Water Treatment Plants (WWTP).

As the ADP evolved to accommodate more ecological and nonpoint source goals, agency and interagency stream and watershed monitoring initiatives revealed more precisely what the higher quality stream were and what needed the most protection. By 2004, this led MDE through COMAR to divide waters into 3 Tiers of quality and levels of protection, and required that those above level I receive greater protection mechanisms.

As more nonpoint source water quality criteria and regulations were created, this process became somewhat superfluous in actuality since most of the front line permitting requirements today more than fill the need for the ADP - such as today's: collective ESD to the MEP mimicking woods in good condition; forest conservation compliance and riparian forest preservation; local and CBCA stream and tidal setback buffer requirements; wetland and waterways permitting; NPDES new construction requirements; and MS4 NPDES requirements regulating the retrofit of older development.

In addition, the ADP's language also defaults – as it has for many years with Section 404 and 401 Corps/WQC permitting - to being a direct impact to a jurisdictional Tier II water. The ADP regulations clearly affirm the use of the term "direct discharge" throughout its language regarding impacts to waters as the trigger, yet the Tier II process has evolved by policy to evaluate any activity in the drainage area to a Tier II water – even if in uplands – to constitute a trigger for Tier II criteria review.

"ADP-like" practices such as stream buffering and ESD to the MEP disconnects are already required. Yet, there is the potential for pre-, during, and post-construction stream monitoring to determine baseline and ultimate conditions to assess any potential impacts of any construction activity even if in uplands to determine if the stream can assimilate any of additional potential pollutants. The applicant may also need to provide a formidable social and economic justification (SEJ) and is not clear as to how the assimilative capacity is determined, what constitutes an acceptable SEJ and how post construction monitoring results are to be used.

Further, the ADP regulations state that "Maryland's wetlands and waterways regulatory process, governed by the Tidal Wetlands (COMAR 26.24.01—26.24.05), Nontidal Wetlands (COMAR 26.23.01—26.23.06), and Waterway Construction (COMAR 26.17.04) regulations, satisfies the requirements of this regulation." This can be interpreted to indicate that when there are impacts to jurisdictional waters, no additional process compliance is necessary should a project need to comply with WWP COMAR – or in other words ADP compliance is achieved when WWP requirements are met.

And even if that were not the case, how can a stream's assimilative capacity be further compromised by new construction if the stream sees nothing after compliance with the aforementioned stacked stream disconnection requirements and having post-development conditions mimic woods in good condition? Is the act of applying an ADP process saying none of these multitudes of other criteria in place are expected to work?

Being in the Deferred Development District, the Mattawoman Creek has garnered a lot of appropriate attention over the years and is indeed a unique resource that should be preserved. I previously provided testimony to the Commissioners assuring them that all the current nonpoint source regulatory criteria in place are sufficient means to accomplish this goal without the need to implement additional criteria such as a mapped planning level buffer. The existing processes allow for site-specific land and water characteristics to be ground-truthed to better establish and fine tune any processes.

Along the way, the Mattawoman Creek Watershed Management Plan prepared by the Corps in 2003 (Study) had been utilized as a basis for future management strategies. It is an excellent document for the time. The Plan should also acknowledge that the current processes in place which were not entirely implemented then, now meet the intent of the Plan. The concluding recommendations of the Study do not necessarily prohibit or limit new development but rather concludes with three basic strategies and recommendations to allow for the continued development of the Mattawoman Creek Watershed, while emphasizing natural resource protection. These are:

"1) The stream valley should be delineated and protected, through zoning category changes, acquisition, or ordinance changes. This area could be used to develop a greenway or park system designed to connect the Mattawoman estuary to the Waldorf Central Business District zone (CB).
2) Site planning on future development should implement low impact design techniques, minimizing the amount of impervious surfaces and promoting stormwater disconnects. New housing developments should emphasize many small-scale stormwater management practices, rather than one single stormwater management pond and emphasize tree cover as a main stormwater management component.
3) Existing developments should be examined for stormwater retrofit opportunities, including the retrofitting of existing commercial sites and housing developments in Waldorf. The technology exists to increase the stormwater management within small scale housing and commercial areas. These techniques should be encouraged through ordinances, public workshops, and re-development projects."

All these goals are presently being met by the currently implemented regulatory criteria through the combination of the County's zoning overlay of the Deferred Development District, the FSD, RPZ, and wetland and waterway permit processes; current ESD to the MEP criteria for woods in good condition; and current SWM redevelopment regulations and NPDES MS4 Permit requirements.

I thank you for the opportunity to consider my comments.

Sincerely,
Andrew T. Der

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OTHER

HAND DELIVERED

May 20, 2016

County Commissioners of Charles County
200 Baltimore Street
La Plata, Maryland 20646

Re: Comprehensive Plan Update

Dear County Commissioners:

I am an attorney engaged in the practice of real estate, land use and zoning law in Southern Maryland for approximately thirty (30) years. I have also been a resident and/or landowner in Charles County since 1976. During my time as a land use and zoning practitioner, I have represented landowners, businesses, developers, builders and construction professionals, both large and small. In addition, my practice involves a good deal of real estate closing work and land use representation for citizens and residents who are not in business. Over the many years in this practice, I have seen Charles County grow and prosper and have had the opportunity to observe land use trends as they have evolved in the County. I am also keenly aware of the interaction between the County and State governments as it relates to program funding, economic development, land use and growth, and other related considerations. It is with this background that I have watched the evolution of the current Comprehensive Plan Update being considered by the County Commissioners. Accordingly, I am submitting this letter with the intent that it be part of the record of the May 17, 2016 public meeting of the County Commissioners regarding the Comprehensive Plan Update. I would like to offer the following observations regarding the Comprehensive Plan Update:

1. The Deferred Development District or Resource Conservation District (RCD) was intended as a future growth area for the County's primary Development District, to be removed from the RCD in parts, as and when needed to facilitate the growth of the County. The word "Resource" in the name of the Resource Conservation District refers to a set aside of future developable land to be added to the Development District, not to an environmental conservation area. The intent of the RCD was to avoid "leap frog development" to provide an orderly and efficient expansion of public infrastructure, including water and sewer, into future development areas of the Development District. It has always been intended that this valuable resource, being future Development District area, would be returned to the Development District in phases as and when needed in light of development trends and pressures.

2. I understand that the Planning Commission has recommended that the land area within the RCD be removed from the RCD and placed in a Watershed Conservation District

(WCD). However, by my observation, this recommendation was made rather arbitrarily, without study, and without a sufficient background or data regarding the need, rationale or impacts of such a major land use decision. I would caution the County Commissioners that this type of land use decision, having a major impact on land use rights and land values, should be carefully considered and should be undertaken only after sufficient in-depth study as to benefits versus the impacts, and the implementation of any mitigation measures that may assist affected landowners.

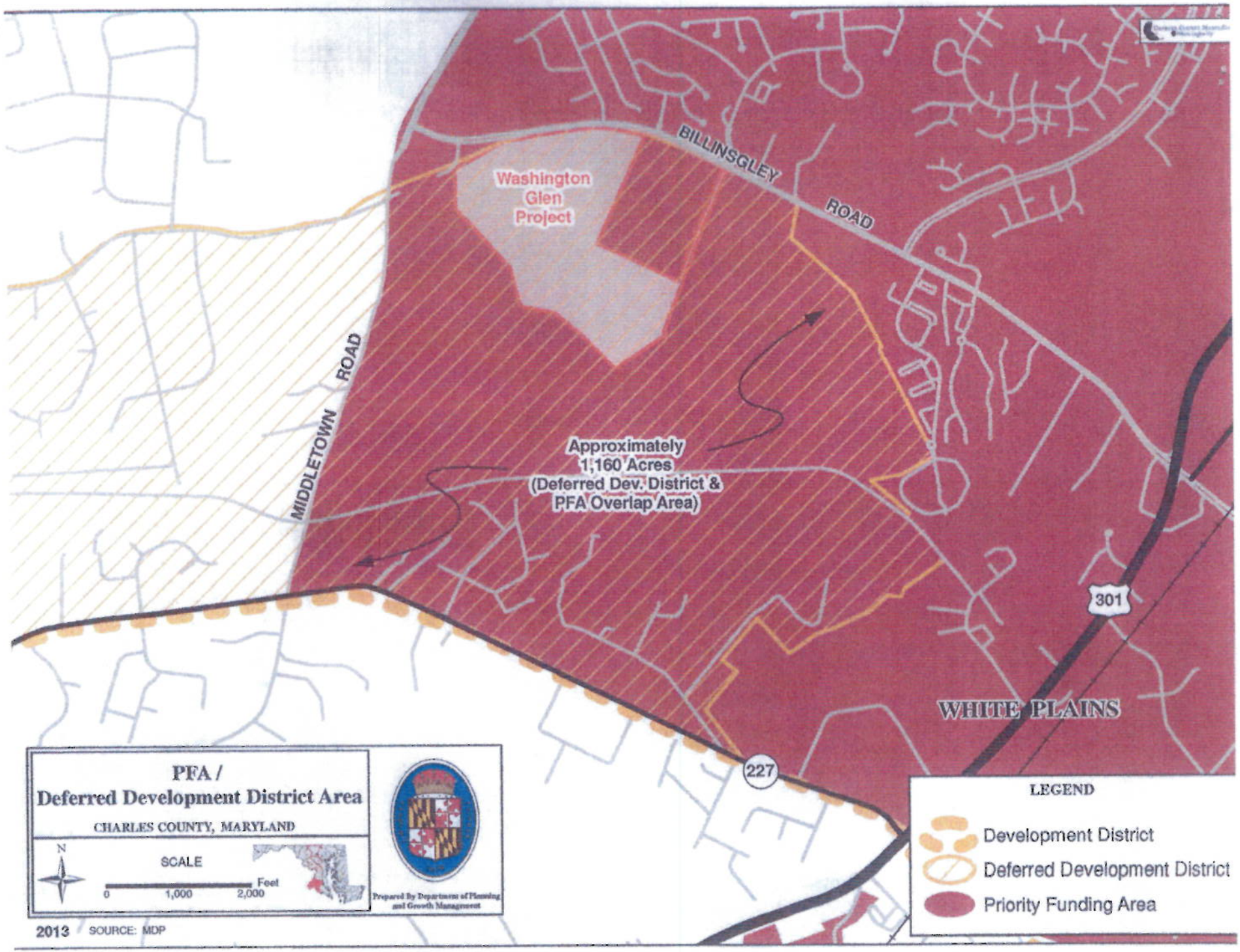
3. The Priority Funding Areas of the County are a valuable resource, which should be protected, nurtured and enhanced. A major area of Priority Funding Area, containing approximately 1,160 acres, is located on the south side of Waldorf extending to the White Plains area, as depicted on the map attached hereto, and made a part hereof, as **Exhibit A**. A number of years ago, this Priority Funding Area was mistakenly placed in the RCD, even though the RCD implementation materials clearly indicated that it was not intended to overlap any Priority Funding Area. In fact, the intent of the RCD is contrary to the Priority Funding Area. As you aware, the Priority Funding Area is recognized by the State for a priority status for such things as funding for community and economic development programs. Accordingly, as part of the Comprehensive Plan Update, the area of the Priority Funding Area depicted on **Exhibit A** should be removed from the RCD and reinstated into the Development District.

4. It should also be noted that the Planning Commission has recommended that the Priority Funding Area depicted on **Exhibit A** be placed in the WCD. Again, this would be inconsistent with the purpose, intent, benefits and legal framework of a Priority Funding Area under State law and under good and responsible land use and planning concepts. Add to this the fact that the Planning Commission's WCD recommendation is ill-conceived and arbitrary and is not supported by a sufficient rationale, and one can only conclude that placing the Priority Funding Area depicted on **Exhibit A** into the WCD would be an arbitrary and capricious land use decision and would be contrary to the best interest of the citizens of Charles County. Again, I strongly urge you to restore the Priority Funding Area, depicted on **Exhibit A**, into the Development District.

Thank you for your attention to the foregoing.

Very truly yours,

Stephen H. Scott
SHS/kd
Enclosure


BILLINGSLEY ROAD
Washington Glen Project
MIDDLETOWN ROAD
Approximately 1,160 Acres (Deferred Dev. District & PFA Overlap Area)
301
227
WHITE PLAINS
PFA / Deferred Development District Area
CHARLES COUNTY, MARYLAND
N
SCALE
0
1,000
2,000
Feet
Prepared By Department of Planning and Growth Management
LEGEND
Development District
Deferred Development District
Priority Funding Area
2013
SOURCE: MDP

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May 24, 2016

VIA HAND DELIVERY & E-MAIL

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Re: Proposed 2016 Charles County Comprehensive Plan

Dear Commissioners:

This letter is respectfully submitted on behalf of our client, Walton Maryland, LLC ("Walton") for your consideration and inclusion in the public record of the 2016 Charles County Comprehensive Plan ("Comp Plan"). It is intended to supplement the issues that were presented in our letter dated April 4, 2016 (enclosed), and to raise additional points that we respectfully request that you consider during your deliberation and final decisions on the Comp Plan. For the reasons stated in our April 4 letter and as supplemented herein, the recommended treatment of the subject 1,160 acres[1] (the "1160 Acres" or the "Subject Property," which includes Walton's planned "Washington Glen" project) proposed by the Planning Commission ("PC") should be rejected. Instead, and as recommended by Planning and Growth Management ("PGM") Staff, the Subject Property should be included in the planned Development District, should retain its Tier II status on the County's public sewer/water Tier Map, should remain a proposed TDR receiving zone, and should remain in the original Priority Funding Area ("PFA") designated by the County and certified by the State in 2000, in its entirety, as it has been for the past 16 years.

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[1]/ The subject property refers to the 1,160 acres on the south side of Billingsley Road, east of Middletown Road, and less than two miles west of U.S. 301. This property was erroneously placed in the Deferred Development District and subsequently rezoned as "Rural Conservation Deferred" ("RC(D)"), which was assigned a permitted density of 1 dwelling unit per 10 acres, in accordance with County Ordinance Number 00-93 in December 2000. Overall, the Ordinance enlarged the Deferred Development District from 5,000 acres to 18,000 acres, including the subject property.

Executive Summary

As explained herein, the PC's recommended downzoning the 1,160 Acres to the (proposed) "Watershed Conservation District" zone ("WCD"), which would limit future development to between 1 dwelling unit per 10 acres (or 1 per 20 acres, depending on which version of the proposal is considered), moving the Subject Property out of Tier II and into Tier IV (with no planned public sewer and water) and reducing the boundaries of the existing PFA (currently covering the entire Subject Property) to include only the footprint of the planned school site (which the Subject Property surrounds on 3 sides, with the right-of-way for Billingsley Road forming the boundary of the 4th side) – would not only violate a host of well-settled "Smart Growth" principles, it would also needlessly jeopardize future State funding for the planned school. In short, isolating the school site in a redrawn PFA, which may not pass State scrutiny – and defy the terms of any permissible waiver of PFA school site requirements – would not only be contrary to the interests of County taxpayers, it would also needlessly violate the constitutional rights of our clients (and of other, similarly situated owners of the Subject Property), both in regard to compensable takings and in regard to requisite substantive and procedural due process, as well as in relation to their rights to equal protection under the law.

As was also clarified in our attached April 4 letter to the Charles County Commissioners and the Planning Commission, more than 90 percent of the Subject Property **is not** in the Mattawoman Creek watershed; nor is **any part** of the136-plus acres owned by Walton. All of the 1,160 Acres are located in close proximity to other dense urban development, County facilities and infrastructure, is overlaid by a designated PFA and has been slated for future development under well-settled County growth management policies for 16 years.[2]

For all of these reasons, more fully explained herein, Walton respectfully asks the Charles County Commissioners (i) to reject the treatment recommended by the PC for the Subject Property in the 2016 Comp Plan, and (ii) to include the Subject Property in the Development District with designation as a TDR receiving area, retaining both its current Tier II designation(for public sewer and water) on the County's adopted Tier Map, and the current PFA

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[2]/ The entire 1,160 Acres was put into the RC(D) zone (Deferred Development District) in December, 2000, only months after the entire 1,160 Acres was included in the County's designated PFA, a designation limited to areas slated for future development. The Subject Property has always been bounded by the Development District and its related public facilities. Therefore, both under "change/mistake" principles and applicable "Smart Growth" principles, the 1,160 Acres has been planned by the County for future development at a greater density than was recently recommended by the PC.

designation required to ensure the County's eligibility for school construction funding from the State.

I. The PC's Proposal To Manipulate The Boundaries Of The Priority Funding Area And Downzone The 1,160 Acres Contradicts Maryland's Smart Growth Initiative And Could Jeopardize The County's Ability To Receive State Funding For New Elementary School #22 on Billingsley Road.

In 1997, the Maryland General Assembly and Governor Glendening enacted into law Senate Bill 389 ("1997 Act"),[3] which was one of the major first steps in realizing the State's growth and planning policies set forth in Maryland's Economic Growth, Resource Protection, and Planning Act of 1992.[4] Much of what the 1997 Act accomplished was to highlight specific geographic areas where development should be focused.

In order to incentivize development in these areas, the State has limited its authority to disburse state-funding for local infrastructure and public works projects to these areas of focused development, which the State aptly calls Priority Funding Areas ("PFAs"). The State automatically classifies certain high-density areas—like the region between the Capital Beltway (I-495) and the District of Columbia, for example—as PFAs, but also allows the governing body of a county to designate certain other areas, but only pursuant to the criteria set forth in SFP § 5-7B-03. For residential-type zones, there are only a very few options available. The following criterion applies to the designation of the Subject Property as part of the PFA:

> "Areas other than existing communities, that are located within locally designated growth areas by the local government and
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> - "The area is planned to be served under an approved 10-year water and sewer plan;
> - "The designation represents a long-term development policy for promoting an orderly expansion of growth and an efficient use of land and public services; and
> - "In the part zoned for residential use or development there is a permitted average density of ***at least 3.5 units per acre***." (Emphasis added.)

Based on the specific criteria set forth in SFP § 5-7B-03, the State has not given the County unlimited discretion to designate new and/or to re-draw existing PFAs. Only the

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[3]/ 1997 Md. laws, ch. 759.

[4]/ The State's policies for smart growth are listed in Md. Code Ann., State Finance and Procurement Article ("SFP") § 5-7A-01.

"governing body" of a county has the authority to designate an area as a PFA; in this case, the Charles County Commissioners. While there is no prohibition against another governmental entity (*e.g.* the PC) making non-binding *suggestions* as to those areas which deserve a PFA designation, the State clearly vests the authority to decide the boundaries of PFAs, at least preliminarily, in the County Commissioners. That said, because the State identifies specific conditions for PFA land, the County Commissioners' PFA designations must also be certified at the State level, as provided in SFP § 5-7B-08. Indeed, in June of 2000, the State certified the County's PFA Map ***in its current form***, which includes the whole 1,160 acres as part of the locally designated growth area and the PFA.

Despite its historic designation as a PFA, the 1,160 acres was placed in the RC(D) zone (the "Deferred Development District") in December of 2000 as part of a temporary effort "to serve for the orderly development of the County over the next 20 years."[5] It was never the County's intention for this area to permanently remain in the RC(D), as the Ordinance expressly reserved to the County Commissioners the authority to reconsider the zoning of RC(D) properties on a five-year basis. As such, properties zoned in the RC(D) may be—and the Subject Property should be—reclassified into the "Development District," allowing for densities of 1 dwelling unit per acre and even greater densities through the purchase of TDRs. *See also* Footnote 2, *supra* regarding the historic "mistake" regarding same.

Why, then, did the Charles County Commissioners identify this area as a PFA, only to include it in the Deferred Development District? Presumably, the former Board identified this as an area appropriate for Smart Growth in years to come. Indeed, it seems plain that the County Commissioners believed that the Subject Property would be a logical place for future development in Waldorf and White Plains. For all of these reasons, and notwithstanding the PC's non-binding suggestion that this area should be moved into the Watershed Conservation District ("WCD")—a still undefined and non-existent zone—the 1,160 Acres still remain a next logical place for development and the entire Subject Property merits retention of its current PFA designation.

There are a number of reasons why the subject 1,160 Acres is ready for development. First, the County Commissioners' own professional Staff at PGM has recommended—consistent with Smart Growth policy—that the 1,160 Acres not be included in the WDC, and should be placed in the Development District. One principal reason for this is that more than 90 percent of the 1,160 Acres (including all of Walton's 136-plus acres) are not in the Mattawoman Creek watershed—the protection of which was the original premise for creating the RC(D) zone, and

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[5]/ 2006 Charles County Comprehensive Plan, at 3-13.

its successor, the proposed WCD zone.[6] Moreover, as recently as March 11, 2014, the BOCC(after much extended debate and deliberation) adopted a Tier Map that placed the entire 1,160 Acres in Tier II, indicating that the area is planned for future sewer service.[7] Moreover, Billingsley Road—whose right-of-way comprises the northern boundary of the Subject Property and the proposed Washington Glen site—has (subsequent to adoption of the County's 2006 Comp Plan) been widened by the County into a 4-lane road with a median, and the County has installed a public water line in that same adjacent right-of-way. Most importantly, however, the Charles County Board of Education ("BOE") has already acquired a site within the 1,160 Acres for the proposed new Billingsley Road Elementary School ("Elementary School #22"), which could be expected to serve the children living in the residential developments planned for the surrounding/adjacent 1,160 Acres.

Why was it so important for the BOE to purchase *this* particular site? Regulations promulgated by the Board of Public Works make clear that State funding for school construction is available only for projects in designated PFA's. When selecting a site for a proposed new

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[6]/ At the Planning Commission Meeting on February 8, 2016 ("2/8/16 PC Meeting"), Steve Ball, the County's Director of Planning, stated the following:

> "This is the area in the black hatched that is now the Rural Conservation Deferred. Except there is another thousand acres [referring to the 1,160 acres], if you recall the discussion on this eastern portion of it that would've also been in the RC(D) and ***we are suggesting in the draft comprehensive plan to release this from the RC(D) and not include it in the Watershed Conservation District because it's not within the Mattawoman Watershed Boundary***." (Emphasis added.) 2/8/16 PC Meeting, at 96:18-96:52.

Later on in that meeting, PGM Planning staff member Charlie Rice stated:

> "The Staff Proposal in the draft plan was to, kind of, hold out that 1,100 acres as some compromise of permanently converting a huge vast area to Watershed Conservation, totally opposite of what the prior plans were-- and take out 1100 acres in the region that were probably most likely-- ***if you were ever to start opening up the Deferred Development District most likely would be the area that you would look at first***. And, that's one of the reasons why it was chosen. While it may not be served by public water and sewer currently, it's fairly close to it and easiest to start to serve." (Emphasis added.) 2/8/16 PC Meeting, at 125:36-126:19.

[7] / It is important to recall in this context that, in regard to its proposed development, Walton would be financing the installation of both offsite and onsite public sewer infrastructure improvements. Because Walton's property and the school site are located adjacent to one another, Walton can easily accommodate the school's sewer needs with a temporary pump station and would allow the County to use it at no cost. Furthermore, as the County has already located the lowest point of the 1,160 acres, there is an opportunity to construct a larger pump station for the 1,160 acres to be paid for by a public/private partnership. Doing this would allow existing homes currently on failing or undesired septic systems, as well as new development projects upstream, to connect to the single pump station. This option could also allow for numerous existing temporary pump stations to be taken off-line by the County. As a result, substantial taxpayer monies would be saved, which could then be spent on enhancing school construction, educational programs, and teacher salaries.

school, "unless a waiver is granted [by the Interagency Committee on School Construction (the "IAC")], a new school . . . proposed for planning and funding approval ***shall be in a priority funding area***."[8] (Emphasis added). Thus, in order for a county to ***ensure*** that a new school project is eligible for State funding, it must be located within a larger PFA.

However, the criteria in SFP § 5-7B-03 demonstrates that the State will not permit just any area to be designated as a PFA; consequently, not just any school site may be eligible for State funding. Rather, the General Assembly clearly intended for PFAs to be in areas that the counties target for new, planned growth and development. Of course, this necessary conclusion is also compelled by well settled tenets of "Smart Growth," wherein the highest density of residential growth is supposed to be filled in around existing infrastructure for not only the "greenest" outcome, but also for the most efficient apportionment of finite County resources.[9]

It made perfect sense, on that basis, for the BOE to purchase the proposed school site for the construction of Billingsley Road Elementary School (Elementary School #22). It is important to note that while the BOE was able to secure the funds for acquisition of the site and design of the improvements ***while the entire surrounding 1,160 acres were part of a PFA***, the

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[8]/ COMAR §§ 23.03.02.03, 23.03.02.28. Based on the conduct of the County, procedural irregularities and the factors listed in COMAR § 23.03.02.28(C), the County will probably be precluded from securing a timely waiver of the PFA requirement from the State. In determining whether to grant a waiver, the IAC will first consider the "efforts made by the [County] to secure a site within a priority funding area." Here, the PC's recommendation runs ***counter*** to "securing a site within a PFA"—by eliminating the designated PFA that already includes the proposed school site. Also, the IAC will consider whether the site "is located as proximate to the [PFA] as possible". What will become immediately obvious to the IAC in its review of any waiver application by the County is that the efforts of the PC—and the Charles County Commissioners, should they choose to follow the recommendations of the PC—have completely isolated the site, which was formerly situated within a substantial PFA, designated 16 years ago after the deliberate and careful consideration of the County, and certification by the State. In addition, there has been no apparent effort "to achieve the needed capacity through additions to existing schools inside the [PFA]," prior to seeking state funding for new school construction which lies outside the natural boundaries of a PFA. As discussed *infra*, there are already several public elementary schools within the existing PFA to the north of Billingsley Road, which could be logical recipients of State funding for school construction. Given that it is the policy of the State "to ***target the rehabilitation of existing schools*** to ensure that facilities in established neighborhoods are of equal quality to new schools" and that many of the students who will be enrolled in the new school already reside in a PFA that has existing public school facilities, there is no logical reason why the State should choose to award the County a waiver. Thus, the County could be precluded from securing a waiver from the State for funding when many, if not all, of the factors listed in COMAR § 23.03.02.28 have not been satisfied and the much smaller PFA (only to cover the school site) is the result of transparent manipulation of those boundaries to eliminate the potential for development in the surrounding area.

[9]/ The State's "Economic Growth, Resource Protection, and Planning Policy" encompasses all of these as considerations as the State's broad policies on "smart growth." SFP § 5-7A-1(a)(1) (emphasizing quality of life and sustainability); SFP § 5-7A-1(a)(3) (concentrating growth areas around existing population); SFP § 5-7A-1(a)(5) (selecting growth areas near existing infrastructure); SFP § 5-7A-1(a)(10) (conserving local resources); SFP § 5-7A-1(a)(11) (encouraging stewardship of the land through efficient growth and use of resources).

"lion's share" of the cost (i.e. the actual construction expenses) still remain to be secured. For the following reasons, the recent attempt by the PC to gerrymander the subject PFA, such that it only covers the school site, could deprive the County of the State share of funding. In short, the proposed school site may no longer satisfy the State's PFA criteria and its funding policies on new school construction. With so much at stake, and increasing competition at the State level for limited school construction funds, the County Commissioners should not follow the Planning Commission's recommended course, which—for the reasons stated—will needlessly jeopardize vital State funding for construction of the new school on a site that the BOE has already purchased.

Given that almost all of the 1,160 Acres are clearly not part of the Mattawoman Creek watershed, that the entire 1,160 Acres is currently located within a long established and designated PFA, and it is now (with planned school site) the next logical place for planned growth to occur, it makes no sense to perpetuate the "mistake" that erroneously placed the 1,160 acres in the Deferred Development District, by transferring it into a proposed WCD, when it has a long standing PFA designation, is intended for future growth and development, and has been designated Tier II by the County and is planned for future sewer service. In addition to jeopardizing State funding for the new school, a change in these designations would also eliminate any possibility of Smart Growth development in the area surrounding the school.[10]

The property north of Billingsley Road also has an existing PFA designation. Thus it might be tempting to argue that designating a PFA exclusively for the footprint of the school site would merely create a contiguous appendage to that existing PFA north of Billingsley Road. However, the County must have its PFA map certified by the Maryland Department of Planning. The State planning staff may not be willing to overlook an effort to manipulate the PFA designation that is inconsistent with the original purpose and criteria for PFA's. Unlike the PC, the State will evaluate whether an individual 48-acre site, owned by the Charles County BOE and slated for the site of a new elementary school, complies with State standards for PFA designation. For the foregoing reasons, MDP may find that this hasty and ill-considered recommendation of the PC could jeopardize proposed State funding for the school.

Under the PC's proposed Plan, the isolated 48 acre school site PFA would still be surrounded by proposed new WCD on three sides, with a minimum allowable density of 1

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[10]/ In response to a Planning Commission member's question about the impact of the change from RC(D) to WCD, Mr. Ball stated:

"The biggest difference is, well, the focus is for conservation purposes. ***And, secondly it would never be [developed]. It's not deferred. It's not going to be removed [from a low-density zone] for future development projects.***"2/8/16 PC Meeting, at 99:45-100:00. (Parenthetical and emphasis added.)

dwelling unit per 10 acres.[11] Again, to propose a school site on an isolated footprint surrounded by effectively undevelopable land would not align with the State's policies on Smart Growth and new school construction.

In fact, the PFA properties to the north have already been developed as concentrated residential properties, and an elementary school in the middle of each existing community already serves the students from those neighborhoods. In addition, the State's policies on new school construction pertaining to Smart Growth and PFAs is found in SFP § 5-7B-07, which provides that "[i]t shall be the policy of the State that the emphasis of funding for public school construction projects shall be to ***target the rehabilitation of existing schools*** to ensure that facilities in established neighborhoods are of equal quality to new schools." (Emphasis added). Read in conjunction with requirements set forth in remainder of subtitle 7B, the PC's initial recommendation to eliminate the PFA overlay for the 1,160 Acres of land designated for future development, only to then urge its partial reinstatement a month later, but only on an isolated 48 acres—for the ***sole purpose*** of trying to retain State funding for the construction of a new school—will be seen for what it is: in short, an untenable effort to further a political agenda to prevent growth—in this case, Smart Growth—while retaining a wholly-inconsistent right to access State funding intended only for proposed new schools located in properly-drawn PFA's. If there is to be no new development of the land surrounding the proposed school site, there is no reason for the State to authorize such a small site to receive public funding to construct a new school, when there already exist a number of public school facilities in the adjacent PFA that should receive priority funding for increased capacity in accordance with well-settled State policy.

Billingsley Road also creates a significant geographic obstacle between the subject school site and the PFA residential properties to the north. Along the road right-of-way where the proposed school site is located, Billingsley Road has four (4) lanes of traffic plus a median running east-west, with a posted speed limit of 45 miles per hour. Because of this significant physical barrier, the school site should be treated by the State as distinct from the developments to the north and, thus, a separate area for purposes of calculating the average density of the PFA. Without any development adjacent to the school site itself, State officials reviewing the PFA map could rightfully deduce that nearly all of the attending children would either be traversing Billingsley Road on a daily basis or be bussed in from even more distant communities. For all these reasons, and unless the 1160 Acres remains eligible for Development District zoning and the current longstanding PFA designation is retained for the Subject Property, State officials

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[11]/ This density in WCD may be ***even lower***—at 1 dwelling unit per 20 acres—if the PGM staff's recently-published slideshow for the May 10, 2016 work session is given any consideration, over the objection of the Subject Property owners. See Planning Director's County Commissioner Briefing for May 10, 2016, at slides 36, 37.

could rightly refuse funding for the geographically-isolated school site now recommended by the PC. Indeed, and on this record, unless the current PFA designation is retained for the entire 1160 Acres, the State could limit construction funds in favor of alternative improvements to existing facilities situated in the PFA north of Billingsley Road.

In summary, the PFA designation of the school site is highly dependent on the PFA designation of the surrounding properties that comprise the balance of the 1,160 acres. It all comprises a contiguous and cohesive area, close to the urban development district in Waldorf and White Plains, the U.S. 301 corridor, previously designated for future planning growth and development. If the County places all of the 1,160 acres in the WCD, the PFA designation of the entire area, including the school site, will be considered to have been removed, placing the County at a disadvantage in securing State funding for construction of the new Elementary School, or rendering the project ineligible for funding. Also, for the reasons already explained, the County would probably be ineligible for a PFA waiver from the IAC and/or the Smart Growth Subcabinet within the Maryland Department of Planning.[12] In addition to delaying construction of the school (scheduled to begin in 2018), a "waiver" would also lack merit in law and fact. Hence, if it is the County's intention to ***ensure*** the likelihood of receiving State funding for the construction of Billingsley Road Elementary School (Elementary School #22) in a timely manner, the best, and likely the only plausible course of action is to retain the longstanding PFA designation for the entire 1,160 acres and to allow concurrent development around the school site as was originally contemplated by the 2006 Comprehensive Plan, including the retention of its Tier II designation and moving the entire 1160 Acres into the Development District, allowing 1 dwelling unit per acre, with the ability to acquire greater density through TDRs.

II. The County Commissioners' Adoption Of PC's Recommended Treatment Of The 1,160 Acres In The Comp Plan Will Violate Walton's Constitutional Rights As A Property Owner Within The Subject Area.

Due to the pivotal PFA concerns about school funding discussed above, the County Commissioners should reject the recommendations of the PC for the Subject Property, exclude the 1,160 Acres from the proposed WCD zone, retain the Tier II classification, include the 1,160 Acres in the Development District with TDR receiver designation, and retain the PFA classification to comport with Smart Growth principles and to maximize its chances for State funding for the new school. In addition, any contrary decision by the County Commissioners

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[12]/ *See* footnote 8, *supra;* COMAR § 23.03.02.28(B)(5).

(e.g. to include the 1,160 Acres in the still-to-be-defined WCD) would also clearly violate Walton's constitutional rights as a property owner within the 1,160 acres.[13]

A. County Commissioners' Adoption Of PC's Recommended Treatment Of The 1,160 Acres In The Comp Plan Will Yield An Unlawful Regulatory Taking Of Walton's Property.

Walton has obviously made a considerable investment in purchasing the Washington Glen property with the reasonable presumption that it would be able to develop the land in accordance with the representations and goals of future County development put forth in the 2006 version of the Comp Plan. However, if the 1,160 Acres were rezoned consistent with the PC's recommendations, there will no longer remain any viable economic value to the Subject Property, and particularly Walton's Washington Glen property. Under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a regulation that completely eliminates the viable economic value of private property is *per se* an unlawful taking. Id. at 1020 ("When the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

Although the yet-to-be-defined WCD zone may—we are told to believe—permit 1 dwelling unit per 10 acres, or even 1 dwelling unit per 20 acres,[14] **there is no indication that the property will be developable *at all* without any access to public sewer and water services.** As of this moment, the PC's Plan is calling for a downgrade of the 1,160 acres to Tier IV, which means that any development on the Subject Property will have to rely on septic systems for disposing of project waste. Yet, due to the as-planned development called for under the 2006 Comp Plan and the County's only recent inclusion of the Subject Property in Tier II, we are unaware of any percolation studies, let alone successful ones, having been conducted on the 1,160 acres. This leaves open the possibility that even septic disposal is unavailable on these properties, should they be placed in Tier IV. If that turns out to be the case and the subject

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[13]/ Walton and counsel understand the implications of a Comp Plan and the distinctions between that and a comprehensive rezoning. Nonetheless, it is our belief that Walton's injuries can be readily identified upon approval of the Comp Plan, despite the necessary hurdle of comprehensive rezoning. As part of the Smart Growth initiative, Maryland enacted the Smart and Sustainable Growth Act of 2009, which in part, imposes a consistency requirement creating a nexus between planning and zoning. Md. Code Ann., Land Use Article §§ 1-303, 3-303. This has caused the Maryland Court of Special Appeals "to **conclude** that, with respect to significant aspects of local government land use regulation, **comprehensive plans** have indeed been elevate[d] . . . to the level of **true regulatory devices**." Friends of Frederick Cnty. v. Town of New Market, 224 Md. App. 185 (2015) (Alteration in original) (Emphasis added) (Internal quotation marks omitted). Thus, upon any ill-advised adoption of the PC's recommended Comp Plan in regard to the 1160 Acres, that will set into motion a chain of events culminating in significant constitutional violations against Walton.

[14]/ See Planning Director's County Commissioner Briefing for May 10, 2016, at slides 36, 37.

properties cannot be developed with *any* type of habitable structure, then (under Lucas) there is clearly a deprivation of "*all* economically beneficial uses."

Even if it turned out that the Subject Property could indeed utilize septic disposal systems, there is still a significant restriction imposed on the Subject Property, amounting to a (non-*per se*)regulatory taking. Under the Supreme Court Decision's in Tahoe-Sierra[15] and Lingle,[16] a regulatory taking that amounts to less than a complete deprivation of economic value is analyzed under the Penn Central[17] 3-factor balancing test—(i) economic impact on the landowner, (ii) extent to which the regulation interferes with reasonable investment-back expectations, and (iii) character of the government action.[18] As for the first prong, a complete deprivation of economically viable use of the property is not necessary to establish a regulatory taking. Even though the proposed WCD may potentially allow for 1 dwelling unit per 10 acres, with a Tier IV designation any development would probably still be limited to seven (7) *units* per minor subdivision.[19] The disparity between that which *could* be realized and developed on the subject property based on the PFA designation with appropriate zoning, and the proposed demotion of the property to WCD, not only demonstrates patent unfairness, but would also *severely* deplete the realizable economic value of the property. Regarding the second prong, as previously noted, Walton acquired the Washington Glen property at considerable expense in reasonable expectation of viable residential development.

With respect to the last prong, the "character" of governmental action which amounts to a regulatory taking effectively means "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." Lingle, 544 U.S. at 539. Here, the PC's untenable recommendation to include the 1,160 in the WCD – when (i) over 9/10ths of the 1,160 Acres are admittedly **not** part of the Mattawoman Creek watershed, the ***target of the watershed conservation*** efforts and (ii) the County Commissioner's expert PGM Planning staff has recommended against it on Smart Growth grounds – clearly lacks any legitimate public purpose and is therefore akin to

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[15]/ Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[16]/ Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[17]/ Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[18]/ Lingle, 544 U.S. at 528 ("Regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property (citations omitted) . . . , or (2) where regulations completely deprive an owner of "*all* economically beneficial us[e]" of her property (citing Lucas) . . . . Outside these two categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by [Penn Central].").

[19]/ PC's Proposed 2016 Comp Plan, at 3-22, n.4.

governmental condemnation. Penn Central, 438 U.S. at 127 (recognizing that "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose").

Based on the foregoing, and regardless of the as-planned action would deprive Walton of "all" the economically viable uses of the Washington Glen property, proceeding with the proposed Comp Plan in its current form will clearly expose the County to legitimate claims to compensation, needed to redress any such compensable regulatory taking. For all of the stated reasons, the County Commissioners should not follow the PC's Comp Plan recommendation for the subject 1,160 Acres, but rather should include the Subject Property in the Development District with TDR receiver designation, and retain its current Tier II status with the current PFA designation, as was originally recommended by PGM Planning Staff.

B. County Commissioners' Adoption Of PC's Recommended Treatment Of The 1,160 Acres In The Comp Plan Will Violate Walton's Right To Substantive Due Process.

In addition, the PC's recommendations in its version of the Comp Plan for the subject 1,160 acres would also violate Walton's and the other landowners' rights to substantive due process under both Maryland and Federal constitutional law. Article 24 of Maryland's Declaration of Rights provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Article 24 "protect[s] an individual's interests in substantive and procedural due process." Samuels v. Tschechtelin, 135 Md. App. 483, 523, 763 A.2d 209 (2000). Like other state courts, Maryland courts "give less deference to legislative judgment [than do federal courts] and hold invalid zoning restrictions only tangentially related to the public welfare or found to be unduly oppressive, fundamentally unfair, or overinclusive or underinclusive in their impact." Levinson v. Montgomery County, 95 Md. App. 307, 318, 620 A.2d 961, 966, cert. denied, 331 Md. 197, 627 A.2d 539 (1993) (citing 1 Arden H. and Daren A. Rathkopf, The Law of Zoning and Planning § 3.04[5] (1992)) (emphasis added). Similarly, the Maryland Court of Appeals has held that:

> the governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of the use of his land is not unlimited, and such restriction cannot be imposed if it does not bear a ***substantial relation*** to the public health, safety, morals, or general welfare. Legislative bodies have no authority, under the

guise of the police power, to impose ***unreasonable*** and ***unnecessary restrictions*** on the use of private property in pursuit of useful activities. (Emphasis added.)

City of Baltimore v. Cohn, 204 Md. 523, 530, 105 A.2d 482 (1954).[20]

Similarly, under the Federal substantive due process test, zoning laws can be held invalid if they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Co., 272 U.S. 365, 395 (1926); Brady v. Town of Colchester, 863 F.2d 205, 215 (2d Cir. 1988) ("the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions"). Under a state due process claim, Maryland applies a similar test, but has demonstrated "a much greater willingness than their federal counterparts to find that as a matter of due process a zoning restriction is arbitrary and unreasonable." Levinson, 95 Md. App. at 318, 620 A.2d at 966 (citing 1 Arden H. and Daren A. Rathkopf, The Law of Zoning and Planning§ 3.04[5] (1992)).

The PC's decision to ignore the recommendations of its expert PGM Staff,[21] despite understanding the implications and reasons for the proposed WCD zone, was indeed arbitrary and capricious decision-making at the expense of Walton. Including the entire 1,160 Acres in the WCD, which has the specific purpose of preserving the Mattawoman watershed, clearly "does not bear a substantial relation to the public health, safety, morals, or general welfare," as required for such measures to pass constitutional muster.[22] It bears repeating that Planning Director Ball and the expert Planning staff have consistently "suggest(ed) in the draft comprehensive plan to release this from the RC(D) and not include it in the Watershed Conservation District is because it's not within the Mattawoman Watershed Boundary."2/8/16 PC Meeting, at 96:18-96:52. Moreover, the Planning Staff provides its recommendations to the PC ***precisely because*** the PC members are appointed lay-persons who "typically do not have formal planning training."[23]

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[20]/ See also Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 66, 254 A.2d 700 (1969) ("broad test of the validity of a comprehensive rezoning is whether it bears a ***substantial relationship*** to the public health, comfort, order, safety, convenience, morals and general welfare") (Emphasis added).

[21]/ In addition to the excerpts quoted from the actual hearing, the expert PGM Planning staff indicated visually on its 2/8/16 slideshow titled "Charles County Comprehensive Plan, Review of Mattawoman Creek Impervious Coverage, Bryans Road and Western County Land Uses" ("2/8/16 slideshow") that the PC should consider removing the 1,160 acres from the RC(D) and WCD as one "Direction to Proceed."

[22]/ Slide 7 of the 2/8/16 slideshow, titled "How Can We Improve Water Quality in the Mattawoman Watershed?", specifically provides the point "(b) *Implement the new Watershed Conservation District*".

[23]/ Planning Commission, Charles County Maryland, https://www.charlescountymd.gov/commissioners/boards/planning-commission (last visited 5/7/16).

Evaluating this action in conjunction with the PC's previously analyzed decision-making related to the attempted circumvention of Maryland's PFA laws with respect to the school site, it is clear that the PC's recommendation in this instance oversteps the boundaries of sound, lawful, governmental action and, in relation to the Subject Property, the PC's recommendations should certainly not be countenanced by the County Commissioners. For all these additional reasons, the County Commissioners should reject the PC's Comp Plan recommendation in regard to the subject 1,160 Acres and follow the sound and defensible treatment of the Subject Property that was previously recommended by PGM staff.

C. County Commissioners' Adoption Of PC's Recommended Treatment Of The 1,160 Acres In The Comp Plan Will Violate Walton's Right To Procedural Due Process.

The Maryland Court of Appeals has emphasized the importance of ensuring that the procedural mechanisms of land use regulation comport with basic notions of due process:

> Because the power to regulate land use necessarily places the local government in the position of potentially circumscribing a citizen's rights or expectations as to the desired use for a given piece of real property, our appellate courts repeatedly have identified the source of those powers and set forth the minimum procedures necessary to insure that these powers are exercised in an appropriate manner.

Mayor & Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514, 533, 814 A.2d 469, 479-480 (2002). As for the procedural due process that Walton was owed, "[a]t a minimum, due process requires that a deprivation of property be preceded by ' . . . notice and opportunity for hearing appropriate to the nature of the case.'" *Casey v. Mayor and Council of Rockville*, 400 Md. 259, 319, 929 A.2d 74, 111 (2007).

Here, given the strictures recommended by the PC for the Comp Plan with respect to the 1,160 Acres, Walton should be entitled a greater measure of procedural due process in addressing all of the aforementioned arguments. **At a minimum, the County Commissioners should accord Walton the opportunity of a public hearing regarding the status of the 1160 Acres (Walton's 136+ Acres inclusive), prior to any adoption of the Comp Plan in regard to the same.**

D. County Commissioners' Adoption Of PC's Recommended Treatment Of The 1,160 Acres In The Comp Plan Will Violate Walton's Right To Equal Protection.

The arbitrary and capricious nature of the PC's recommended Comp Plan in regard to the Subject Property also represents an unlawful and contrived discrimination against Walton and the other owners of the 1160 Acres that—if adopted by the County Commissioners—would